

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JONAH GOLD,
Plaintiff,

v.

BRIAN SANDOVAL, et al.,
Defendants.

Case No. 3:21-cv-00480-JVS-CBL

ORDER REGARDING MOTION
FOR TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE

Plaintiff Jonah Gold (“Gold”) filed an Emergency Motion for a Temporary Restraining Order and an Order to Show Cause why a preliminary injunction should not issue. Mot., ECF No. 10. Gold provided Defendants Brian Sandoval (“Sandoval”), Melody Rose (“Rose”), Lisa Sherych (“Sherych”), and Steve Sisolak (“Sisolak”) (collectively, “Defendants”) with notice of the motion and an opportunity to file an opposition. Fulton Decl., ECF No. 10-2. The Defendants did not file a response.

For the following reasons, the Court **DENIES** the request for a temporary restraining order and declines to issue an order to show cause why a preliminary injunction should not issue.

I. BACKGROUND

This case concerns the constitutionality of the University of Nevada-Reno’s COVID-19 vaccine policy. On August 20, 2021, the University of Nevada-Reno (“University”) enacted the Student COVID-19 vaccine requirement (“Policy”) which requires all students to be fully vaccinated against COVID-19 before

1 enrolling for the Spring 2022 semester.¹ Gold, who is currently enrolled as an
 2 undergraduate at the University, alleges that he has previously contracted COVID-
 3 19 and recovered. Compl., ECF No. 1, ¶ 12. Gold alleges that he is currently
 4 unable to enroll in in-person classes for the spring semester because of the Policy.
 5 Id. Gold seeks an injunction preventing the University from enforcing the Policy
 6 against him because he alleges that his prior infection gives him superior
 7 immunity to COVID-19 than vaccinated individuals. Id. ¶ 10.

8
 9 On November 9, 2021, Gold filed his complaint seeking declaratory and
 10 injunctive relief based on the alleged unconstitutionality of the Policy. Compl.,
 11 ECF No. 1. On November 19, 2021, Gold filed an emergency application for a
 12 temporary restraining order and an order to show cause why a preliminary
 13 injunction should not issue. ECF No. 10. On December 2, 2021, the case was
 14 assigned to this Court. See ECF No. 26.

15 16 II. LEGAL STANDARD

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 18 Courts look to substantially the same factors when determining whether to
 19 issue a temporary restraining order or a preliminary injunction. See Stuhlberg
 20 Intern. Sales Co., Inc. v. John D. Brush and Co., Inc., 240 F.3d 832, 839 n.7 (9th
 21 Cir. 2001). The plaintiff has the burden to establish that (1) he is likely to succeed
 22 on the merits, (2) he is likely to suffer irreparable harm if the preliminary relief is
 23 not granted, (3) the balance of equities favors the plaintiff, and (4) the injunction is
 24 in the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 5, 20
 25 (2008).

26
 27
 28 ¹See Student COVID-19 vaccine requirement, University of Nevada, Reno,
<https://www.unr.edu/coronavirus/vaccine/requirements>.

1 In the Ninth Circuit, the Winter factors may be evaluated on a sliding scale:
 2 “serious questions going to the merits, and a balance of hardships that tips sharply
 3 toward the plaintiff can support issuance of a preliminary injunction, so long as
 4 the plaintiff also shows that there is a likelihood of irreparable injury and that the
 5 injunction is in the public interest.” Alliance for the Wild Rockies v. Cottrell, 632
 6 F.3d 1127, 1134-35 (9th Cir. 2011). “To reach this sliding scale analysis, however,
 7 a moving party must, at an ‘irreducible minimum,’ demonstrate some chance of
 8 success on the merits.” Global Horizons, Inc. v. U.S. Dep’t of Labor, 510 F.3d
 9 1054, 1058 (9th Cir. 2007) (citing Arcamuzi v. Cont’l Air Lines, Inc., 819 F.2d
 10 935, 937 (9th Cir. 1987)).

11 12 III. DISCUSSION

13 14 A. *Likelihood of Success on the Merits*

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16 The Court begins by considering the most important factor in the
 17 preliminary injunction analysis, whether it is likely that Gold’s complaint will
 18 succeed on the merits. See Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015).
 19 Gold brings three causes of action: (1) violation of substantive due process rights
 20 protected by the Fourteenth Amendment, Compl. ¶¶ 116-129; (2) violation of the
 21 Equal Protection Clause of the Fourteenth Amendment, id. ¶¶ 130-139; and (3)
 22 violation of the Fourth Amendment, id. ¶¶ 140-144. The Court begins by
 23 considering Gold’s likelihood of success on the Fourteenth Amendment claims
 24 before turning to the Fourth Amendment claim.

25 26 i. *Fourteenth Amendment Claims*

27 The Due Process Clause “provides heightened protection against
 28 government interference with certain fundamental rights and liberty interests.”

1 Washington v. Glucksberg, 521 U.S. 702, 720 (1997). Supreme Court
 2 jurisprudence “establish[es] a threshold requirement—that a challenged state action
 3 implicate a fundamental right—before requiring more than a reasonable relation to
 4 a legitimate state interest to justify the action.” Glucksberg, 521 U.S. at 722.
 5 Gold’s complaint alleges that the Policy violates his “right of self-determination,
 6 personal autonomy and bodily integrity, as well as the right to reject medical
 7 treatment.” Compl. ¶ 117. The Court finds that Gold has not established that the
 8 Vaccine Policy implicates a fundamental right. See Glucksberg, 521 U.S. at 722
 9 (describing the “tradition of carefully formulating the interest at stake in
 10 substantive-due-process cases”); Williams v. Brown, – F. Supp. 3d –, 2021 WL
 11 4894264, at *9 (D. Or. Oct. 19, 2021) (“This Court joins [the] growing consensus
 12 and concludes that there is no fundamental right under the Constitution to refuse
 13 vaccination.”). Accordingly, rational basis review is the appropriate standard to
 14 apply to the substantive due process claim.

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 16 Alternatively, Gold argues that the Policy violates the Equal Protection
 17 Clause. To prevail on an equal protection claim, a plaintiff must “show that a class
 18 that is similarly situated has been treated disparately.” Boardman v. Inslee, 978
 19 F.3d 1092, 1117 (9th Cir. 2020). If there is no suspect class at issue, differential
 20 treatment is presumed to be valid so long as it is “rationally related to a legitimate
 21 state interest.” City of Cleburne v. Cleburne Living Cent., 473 U.S. 432, 440
 22 (1985). Gold alleges that the Policy treats unvaccinated individuals in a punitive
 23 way, see Compl. ¶ 132, but does not cite to any binding precedent to suggest that
 24 unvaccinated individuals constitute a suspect class. Cf. Bauer v. Summey, No.
 25 2:21-CV-02952-DCN, 2021 WL 4900922, at *11 (D.S.C. Oct. 21, 2021) (holding
 26 that government policies that “treat vaccinated persons differently than
 27 unvaccinated persons, including those who have natural immunity” do not target a
 28

1 suspect class). Accordingly, the Court applies rational basis review to Gold's
2 Equal Protection claim.

3
4 The rational basis review test is functionally the same under substantive due
5 process and the Equal Protection Clause. See *Gamble v. City of Escondido*, 104
6 F.3d 300, 307 (9th Cir. 1997). Substantive due process only requires a rational
7 relationship between the challenged policy and a legitimate governmental
8 objective. See *Brach v. Newsom*, 6 F.4th 904, 924 (9th Cir. 2021). Under the
9 Equal Protection Clause, if there is no suspect class at issue a policy “need only
10 rationally further a legitimate state purpose to be valid.” *Minn. State Bd. for Cmty.*
11 *Colls. v. Knight*, 465 U.S. 271, 291 (1984) (internal quotations omitted). “Given
12 the standard of review, it should come as no surprise [courts] hardly ever strike[]
13 down a policy as illegitimate under rational basis scrutiny.” *Trump v. Hawaii*, 138
14 S. Ct. 2392, 2420 (2018).

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16 The two-tiered rational basis inquiry first asks whether the challenged law
17 has a legitimate purpose, then whether the challenged law promotes that purpose.
18 See *Erotic Serv. Provider Legal Educ. and Research Project v. Gascon*, 880 F.3d
19 450, 457 (9th Cir. 2018). The Defendants’ stated purpose of mitigating the spread
20 of COVID-19 and preventing severe illness, hospitalizations, and deaths is clearly
21 a legitimate purpose.² See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.
22 Ct. 63, 67 (2021) (“Stemming the spread of COVID-19 is unquestionably a
23 compelling interest.”). The Policy’s references to governmental guidance and
24 scientific research shows that the University considered relevant data before

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26 ² See Letter from Lisa Scherych, Administrator, Division of Public and Behavioral Health,
27 to the Honorable Steve Sisolak, Governor of the State of Nevada (Aug. 20, 2021),
28 https://gov.nv.gov/uploadedFiles/govnewnv.gov/Content/News/Press/2021_docs/2021-08-20_BOH_Regulation.pdf (recommending immediate adoption of the emergency regulation requiring students at Nevada universities and colleges to be fully vaccinated against COVID-19).

1 deciding to implement the Policy. See, e.g., Compl. ¶ 27. While Gold cites to
 2 numerous studies that he alleges show that the Policy is misguided, that does not
 3 mean that his challenge is likely to succeed. Under rational basis review, courts
 4 “do not require that the government's action actually advance its stated purposes,
 5 but merely look to see whether the government *could* have had a legitimate reason
 6 for acting as it did.” Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.,
 7 24 F.3d 56, 66 (9th Cir. 1994) (emphasis in original).

8
 9 Because the Policy easily survives rational basis review, the Court finds that
 10 Gold has not shown that his Fourteenth Amendment claims are likely to succeed
 11 on the merits.

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 13 *iv. Fourth Amendment Claim*

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 15 Gold also alleges that the Policy violates his Fourth Amendment rights by
 16 infringing on his privacy. Compl. ¶¶ 140-44. The only case law he cites to support
 17 that proposition that Fourth Amendment rights are violated is inapposite. See
 18 Anderson v. Taylor, No. 04-74345, 2005 WL 1984438 (E.D. Mich. Aug. 11, 2005)
 19 (finding mandatory blood draws for lipid testing as a condition of employment a
 20 violation of privacy interests). Nasal swab testing for COVID-19 does not create
 21 an intrusion under the skin, does not involve any genetic testing, and there is no
 22 use of the sample for law enforcement purposes. Accordingly, the Court finds that
 23 Gold is unlikely to succeed on his Fourth Amendment claim. See Streight v.
 24 Pritzker, No. 3:21-cv-50339, 2021 WL 4306146 (N.D. Ill. Sept. 22, 2021)
 25 (denying preliminary injunction because plaintiff had not shown that Fourth
 26 Amendment challenge to university policy requiring vaccination or saliva testing
 27 to attend in-person classes was likely to succeed on the merits).

1 *C. Irreparable Harm, Balance of the Harms, Public Interest*

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3 Within the Ninth Circuit, “serious questions going to the merits, and a
4 balance of hardships that tips sharply toward the plaintiff can support issuance of a
5 preliminary injunction, so long as the plaintiff also shows that there is a likelihood
6 of irreparable injury and that the injunction is in the public interest.” Alliance for
7 the Wild Rockies, 632 F.3d at 1134-35. At this stage, Gold has not only failed to
8 show a likelihood of success, he has not raised serious questions going to the
9 merits.

10
11 Even if the Court had found that Gold raised serious questions going to the
12 merits, the other factors would weigh against granting a temporary restraining
13 order. The balance of equities tips sharply towards the Defendants. The
14 Defendants are attempting to protect a campus community with thousands of
15 students, faculty, and staff from a deadly infectious disease. This far outweighs
16 any harm Gold may face in choosing between receiving a medically-approved
17 vaccination or receiving his education in an alternate manner. The public interest
18 also weighs heavily in favor of the Defendants. See Bruesewitz v. Wyeth LLC,
19 562 U.S. 223, 226 (2011) (describing “the elimination of communicable diseases
20 through vaccination” as “one of the greatest achievements of public health in the
21 20th century”) (internal quotations omitted).

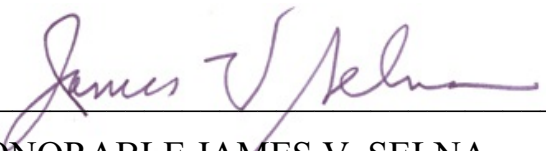
22
23 In light of the failure to raise serious questions going to the merits, the
24 balance of hardships that weighs heavily towards the Defendants, and the strong
25 public interest that weighs against an injunction, the Court **DENIES** the request
26 for an temporary restraining order.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the emergency request for a temporary restraining order and declines to issue an order to show cause.

IT IS SO ORDERED.

DATED: December 3, 2021



HONORABLE JAMES V. SELNA
UNITED STATES DISTRICT JUDGE